Filed 6/21/10 P. v. Castrejon CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CRISANTO MURILLO CASTREJON, Defendant and Appellant.	E048306 (Super.Ct.No. RIF140768) **OPINION**

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

It is undisputed that defendant Crisanto Murillo Castrejon sodomized John Doe, who was then 13 years old. John Doe testified that the sodomy was forcible and not

consensual. Defendant testified that it was consensual and, moreover, that he was very drunk at the time.

A jury found defendant guilty on one count of aggravated sexual assault on a child by means of forcible sodomy (Pen. Code, § 269, subd. (a)(3)) and one count of a forcible lewd and lascivious act on a child (Pen. Code, § 288, subd. (b)(1)). He was sentenced to a total of 23 years to life in prison.

Defendant's sole appellate contention pertains to the forcible lewd act conviction, which was based on evidence that, in addition to forcibly sodomizing John Doe, defendant engaged in forcible oral copulation with him. Defendant notes that there was evidence of two distinct acts of forcible oral copulation and contends that the trial court erred by failing to give a unanimity instruction in connection with this count. We will conclude that the trial court did err; however, because there was overwhelming evidence — including defendant's own testimony at trial — that both acts occurred, the error was harmless beyond a reasonable doubt. Hence, we will affirm.

I

FAILURE TO GIVE A UNANIMITY INSTRUCTION

A. *Factual and Procedural Background.*

A sexual assault examination of John Doe, conducted immediately after the incident, revealed two anal lacerations. It also revealed some superficial scratches, accompanied by tenderness, on the head of his penis.

In a forensic interview conducted one day after the incident, John Doe stated that defendant sodomized him, he orally copulated defendant, and defendant orally copulated him.

When the police interviewed defendant, he admitted that he sodomized John Doe and that he and John Doe both orally copulated each other.

At trial, defendant likewise testified that he sodomized John Doe and he and John Doe both orally copulated each other.

John Doe testified that defendant sodomized him and that he orally copulated defendant. He also testified:

"Q. . . . Did [defendant] ever put your penis in his mouth?

"A. No.

"Q. Are you positive, or can you not remember?

"A. I can't remember.

"Q. So is it possible that he put his mouth on your penis?

"A. Yes."

In closing argument, the prosecutor told the jury that the forcible lewd act charged was based on oral copulation: "So the second count is Penal Code [s]ection 288(b) which is forcible lewd acts on a minor under 14. . . . The 288(b) pertains to the oral sex. You can find oral sex in either the defendant going down on the victim or the victim going down on the defendant. We could have charged two counts of it, one for each, but there's just one here.

"So the touching that we're concerned with in count 2 is the oral sex. Does it matter who was the giver and who was the receiver? They both were. But all that matters is that one of them engaged in this type of behavior with the other."

B. *Analysis*.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

"'Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]' [Citation.]" (*People v. Curry* (2007) 158 Cal.App.4th 766, 783.)

Here, the evidence showed two discrete crimes. Defendant could have been charged with and convicted of two separate offenses based on his forcible oral copulation of John Doe and John Doe's forcible oral copulation of him. (*People v. Scott* (1994) 9

Cal.4th 331, 340-348; *People v. Jimenez* (2002) 99 Cal.App.4th 450, 456 ["when touching moves from one area of the victim's body to another, separate offenses have occurred"].) Accordingly, the trial court should have given a unanimity instruction. (E.g., Judicial Council of California Criminal Jury Instructions No. 3500.)

The error, however, was harmless because the evidence overwhelmingly established that defendant actually committed both acts. John Doe stated that defendant committed both; defendant admitted to the police that he committed both; and defendant admitted at trial that he committed both. There is room for argument only because, at trial, John Doe at first said that defendant did not orally copulate him. He then admitted, however, that he simply did not remember whether defendant orally copulated him. In view of John Doe's original statement and defendant's extremely damaging admissions — along with the scratches found on the head of John Doe's penis — no reasonable juror would have concluded that this act did not happen.

The basic credibility dispute was over whether the sexual acts were forcible. In this respect, there was no distinction between the two acts of oral copulation; the jury would have had to find that they were both forcible or that neither was. It resolved this dispute against defendant. Clearly, if it had been allowed to find defendant guilty on two counts of a forcible lewd act on a child, it would have done so. We are therefore convinced beyond a reasonable doubt that the error was harmless.

II

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.